

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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In the Matter of:)

Lester Sykes,)
Chicago, Illinois,)

Respondent.)
_____)

Docket No. TSCA-05-2008-0013

ORDER TO SHOW CAUSE

The U.S. Environmental Protection Agency, Region 5 (EPA), initiated this proceeding by filing an administrative complaint (Complaint) against Lester Skyes (Respondent), of Chicago, Illinois on June 26, 2008. The Complaint alleges that Respondent violated the Residential Lead-Based Paint Hazard Reduction Act of 1992 and its implementing regulations and seeks civil penalty under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 (Consolidated Rules).

I. Background

EPA allegedly twice attempted to serve the Complaint on Respondent. EPA's second attempt, by U.S. Postal Service priority mail with delivery confirmation, resulted in the Complaint being delivered to Respondent's address on April 22, 2009. Over the next year and a half, Respondent sent two letters to EPA; however, he did not file an answer to the Complaint. On October 20, 2011, EPA filed "Complainant's Motion for Default Order, Finding of Liability and Penalty" (Motion for Default). On August 31, 2012, I issued an Order Denying Motion for Default (Order Denying Default), finding that EPA did not complete or prove service of the Complaint in accordance with the Consolidated Rules or meet the requirements of due process. EPA did not file a motion for reconsideration or seek interlocutory appeal of the Order Denying Default; therefore, its rulings remain in effect.

Notwithstanding the Order Denying Default and without re-serving the Complaint, EPA filed a "Filing of Certification of Service and Filing of Proof of Service of Complaint" (Service Filing) and "Filing of Answer" with the Regional Hearing Clerk on November 8, 2012. EPA attached to the Service Filing: the certificate of service, U.S. Postal Service "Delivery Confirmation Receipt" (original prepared by EPA), and U.S. Postal Service "Track & Confirm" search results (printout of internet page) for its second attempt at service of the Complaint. The Filing of Answer included the two letters sent by Respondent to EPA, which EPA relied on in support of its Motion for Default. On December 12, 2012, EPA sent a letter to the Regional Hearing Clerk,

essentially reminding her of its November 8 filings.¹ On the same day, the Regional Hearing Clerk forwarded the matter to the Office of Administrative Law Judges. By order, the Chief Administrative Law Judge (ALJ) initiated the alternative dispute resolution (ADR) process and assigned a neutral. On January 14, 2013, the designated neutral issued an order returning the matter to the Chief ALJ and a report recommending that the ADR process be terminated and the matter returned to the Regional Judicial Officer, noting that the rulings in the Order Denying Default remain in effect. The Chief ALJ remanded the matter back to me for further consideration and appropriate action. Based on a review of the record, to date, Respondent has not filed any documents in this matter.

II. Order

Before me are EPA's two filings, neither of which it moved for leave to file under 40 C.F.R. § 22.16(a). The precedential and procedural impact of allowing these filings in the record would be substantial; yet, EPA did not provide a clear and supportable justification for either. Therefore, pursuant to 40 C.F.R. § 22.4(c), EPA is ORDERED to show cause:

1. How its Service Filing and the attached "Track & Confirm search results" establish completed service and proof of service of the Complaint. In responding, EPA must address, at a minimum:
 - a. Why it should be allowed to demonstrate proof of service by U.S. Postal Service priority mail with delivery confirmation when that is not one of the methods of service by U.S. Postal Service mail specified in the Consolidated Rules at 40 C.F.R. § 22.5(b)(1)(i);
 - b. Why the requirements for service of a complaint by reliable commercial delivery service should be applicable to its attempt at service the Complaint by U.S. Postal Service mail;
 - c. How the "Track & Confirm search results" attached to its Service Filing prove service of the Complaint as required by 40 C.F.R. § 22.5(b)(1)(iii) and demonstrate completed service in accordance with 40 C.F.R. § 22.7(c).
2. Why its Filing of Answer should not be excluded from the record. In responding, EPA must address, at a minimum:
 - a. What legal authority EPA has to file an answer to its own complaint;
 - b. Whether EPA ever sought or obtained permission from Respondent to submit the Filing of Answer filing on his behalf;

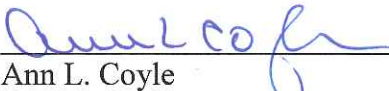
¹ EPA properly served the Service Filing and Filing of Answer, but failed to serve a copy of its December 12 letter on me, as required by 40 C.F.R. § 22.5(b).

- c. How the correspondence EPA attached to the Filing of Answer complies with the form and content requirements for answers under the Consolidated Rules and, if it does not, why it should not be excluded under 40 C.F.R. § 22.5(c)(5); and
- d. How “justice will be best served” by allowing the Filing of Answer when the Complaint has not been properly served.

EPA will have up to and including **March 29, 2013**, to respond to this Order. Its response should be supported by relevant legal authority and be accompanied by any affidavit, certificate, other evidence or legal memorandum on which it relies.

IT IS SO ORDERED.

Date: March 8, 2013


Ann L. Coyle
Regional Judicial Officer
U.S. EPA Region 5

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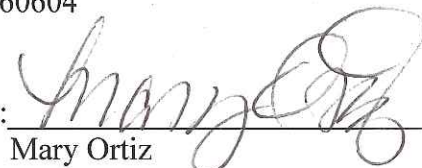
CERTIFICATE OF SERVICE

I certify that I filed with the Regional Hearing Clerk the original and one copy of the foregoing **ORDER TO SHOW CAUSE**, dated March 8, 2013, by hand delivery at the following address:

LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard (E-19J)
Chicago, Illinois 60604

On the 11 day of March 2013.

By:



Mary Ortiz
Administrative Program Assistant
Office of Regional Counsel

In the matter of: Lester Sykes
Docket No.: TSCA-05-2008-0013

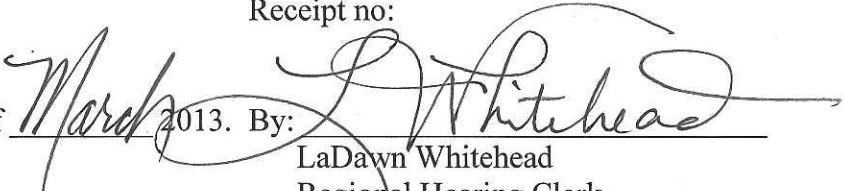
CERTIFICATE OF SERVICE

I certify that I sent the foregoing **ORDER TO SHOW CAUSE**, dated March 8, 2013, to the following people in the following manner:

Copy, by EPA internal mail, to: Ann Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard (C-14J)
Chicago, Illinois 60604

Copy, by EPA internal mail, to attorney for Complainant: Mary T. McAuliffe
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard (C-14J)
Chicago, Illinois 60604

Copy, by United Parcel Service, to Respondent: Lester Sykes
200 East 96th Street
Chicago, Illinois 60628
Receipt no:

On the 11 day of March 2013. By: 
LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5

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